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Land Use and the First Amendment

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Publisher's Statement

Recent Developments in Land Use, Planning and Zoning Law

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THE PAST YEAR SAW NO CESSATION in cases reporting on the conflicts that arise when local land-use regulation is applied to uses claiming protection under the First Amendment. This report highlights the major developments in this area.

I. Regulation of Religious Institutions

A. *The Religious Freedom Restoration Act (RFRA)*[1]

Since RFRA's enactment in 1993,[2] both courts[3] and scholars[4] have questioned the Act's constitutionality. This question will now be de-

1. 42 U.S.C. §§ 2000b to 2000b–4.

2. The genesis of the Act lay in congressional dissatisfaction with a 1990 decision of the U.S. Supreme Court which had dramatically altered the treatment of claims to religious freedom under the First Amendment's Free Exercise Clause. In Employment Division v. Smith, 494 U.S. 872 (1990), the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " *Id.* at 879, *quoting* United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens concurring).

Three years after *Smith*, however, in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993), the Court unanimously agreed on the general principle that laws which are nonneutral, because their object is to infringe upon or restrict practices based on their religious motivation, may only be upheld if justified by a compelling governmental interest and the law is narrowly tailored to advance that interest. The *Hialeah* case thus sent a strong signal to the lower courts that the *Smith* decision should not be read to permit the targeting of religious practices under the guise of a purportedly general and religiously neutral ordinance.

3. *Compare* Keeler v. Cumberland, 928 F. Supp. 591 (D. Md. 1996) (*Keeler I*) (holding RFRA unconstitutional as violation of separation of powers), *and* Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (holding Act unconstitutional on grounds Congress did not act pursuant to an enumerated power), *with* Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), *rev'g*, 877 F. Supp. 355 (holding Act constitutional pursuant to congressional enforcement power under section 5 of the Fourteenth Amendment).

4. *See, e.g.*, Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994).

cided in *Flores v. City of Boerne*,[5] a case argued before the U.S. Supreme Court this past Term. In *Boerne*, the Catholic bishop of San Antonio, Texas, claimed that the City of Boerne had violated RFRA when it denied a building permit for a proposed addition to St. Peter Church because the church was located partially in an historic district. At trial, the federal district court, citing *Marbury v. Madison*,[6] found RFRA unconstitutional because the statute usurped the power of the judiciary "to say what the law is"[7] and also held that Congress lacked the power to enact RFRA under section 5 of the Fourteenth Amendment (the Enforcement Clause) and that RFRA violated the Tenth Amendment because it limits the states' powers to legislate in areas traditionally under state sovereignty.

The Fifth Circuit Court of Appeals reversed,[8] holding that RFRA does not violate the separation of powers and that the enforcement clause of the Fourteenth Amendment empowers Congress to legislate acts such as RFRA to scrutinize statutes that burden an individual's free exercise of religion. The U.S. Supreme Court granted certiorari in October 1996 and the case was argued on February 19, 1997.

At oral argument, the members of the Court closely questioned counsel for the City of Boerne and the church on four separate areas involving the constitutionality of RFRA: (1) the authority of Congress to enact the statute under section 5 of the Fourteenth Amendment; (2) whether RFRA violates the separation of powers by returning the task of accommodating general laws and religious practices to the courts after *Smith* denied that power; (3) whether RFRA violates the Establishment Clause of the First Amendment; and (4) whether RFRA violates the

5. 73 F.3d 1352 (5th Cir. 1996).

6. 5 U.S. (1 Cranch) 137 (1803).

7. 877 F. Supp. 355 (W.D. Tex. 1995). Specifically, the district court reasoned that in enacting RFRA Congress impermissibly sought to overturn the Supreme Court's decision in Employment Division, Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), by imposing stricter standards of scrutiny for legislation affecting First Amendment rights than were set forth in *Smith*, where the Court held that the First Amendment's Free Exercise Clause does not prohibit application of a facially neutral, generally applicable law to religious practice. Congress had clearly articulated its disagreement with *Smith* in the statutory language of RFRA, which states that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a). In contrast to *Smith*, RFRA mandates that the government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability "unless (1) it is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb(a) & (b).

8. Flores v. City of Boerne, 73 F.3d 1352 (5th Cir.), *cert. granted*, 117 S. Ct. 293 (1996).

Tenth Amendment by limiting state control in areas of traditional sovereignty.

Lower court decisions in land-use cases involving RFRA have yielded mixed results, a point that may well become moot depending on the Court's decision on RFRA's constitutionality. For example, while *in Jesus Center v. Farmington Hills Zoning Bd. Of Appeals*[9] and *Western Presbyterian Church v. District of Columbia*,[10] the courts found that RFRA barred enforcement of zoning restrictions on religious institutions, in *Daytona Rescue Mission, Inc. v. City of Daytona Beach*,[11] a Florida federal district court rejected a claim that the Act barred the application of locational restrictions to a homeless shelter and food bank proposed to be housed in a church.[12] In other cases decided under the Act, courts: (1) denied a claim that the Act bars the application of parking requirements to religious institutions[13]; (2) held that the Act does not apply to uses that constitute a nuisance, in this instance a massive display of Christmas lights that created traffic jams and other problems in a residential neighborhood[14]; and (3) denied a preliminary injunction to plaintiffs claiming that the Act bars the need for a special permit for a Wiccan Church in a residential district.[15]

B. *Zoning Cases Involving Religious Institutions*

Although state courts have traditionally applied a substantive due process analysis in cases dealing with zoning control over religious institutions,[16] in the past decade there has been a movement in some state courts toward applying an analysis based on the First Amendment.

9. 544 N.W.2d 698 (Mich. Ct. App. 1996).

10. 849 F. Supp. 77 (D.D.C. 1994).

11. 1995 WL 289632 (M.D. Fla.).

12. The court found that "the City's interest in regulating homeless shelters and food banks is a compelling interest and that [the zoning] code furthers that interest in the least restrictive means," thus upholding the city under the First Amendment analysis that predated *Smith*. *Id.* at 6. *See also* First Assembly of God of Naples, Florida, Inc. v. Collier County, 20 F.3d 419 (11th Cir.), *opinion modified on denial of reh'g*, 27 F.3d 526 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 730 (1995). Here, the Eleventh Circuit, without reference to the Act, held that the closing of a church-operated homeless shelter due to violations of various zoning laws did not violate the First Amendment. Subsequently, the Eleventh Circuit modified its opinion, stating that "the Religious Freedom Restoration Act of 1993 may apply to this case. However, since it was not raised by either party, we decline to discuss it." 27 F.3d at 526.

13. Germantown Seventh Day Adventist Church v. Philadelphia, 1994 WL 470191 (E.D. Pa.).

14. Osborne v. Power, 890 S.W.2d 570 (Ark. 1994) (citing dictum in *Western Presbyterian*).

15. Church of Iron Oak v. Palm Bay, 868 F. Supp. 1361 (M.D. Fla. 1994). The court also declined to enter injunction due to doctrine of abstention.

16. *See, e.g.*, LAND USE AND THE CONSTITUTION 131-32 (Brian W. Blaesser & Alan C. Weinstein, eds. 1989).

Recent cases that illustrate this trend include: *Grace Community Church v. Town of Bethel*,[17] *Macedonian Orthodox Church v. Planning Board of the Township of Randolph*,[18] and *Kali Bari Temple v. Bd. of Adjustment*.[19]

C. *Historic Preservation of Houses of Worship*

The majority of courts that have ruled on First Amendment challenges to the application of historic preservation ordinances to religious institutions have found the ordinances to be unconstitutional.[20] In the most recent cases, both state and federal courts again found that the application of landmark laws to houses of worship was unconstitutional.

In *First United Methodist Church v. Hearing Examiner*,[21] the Washington State Supreme Court held that the mere nomination of a church as a landmark violates the First Amendment due to the constraints imposed on the church by the interim controls that apply as a result of nomination. In two federal district court cases involving the denial of a permit to demolish a monastery, the court, after rejecting a challenge brought under RFRA on the ground that the Act was an unconstitutional as violation of separation of powers,[22] applied a "compelling governmental interest" test to find that the permit denial violated the federal and state constitutions based on its finding that the local landmark law was "not a neutral law of general applicability" under *Smith* due to its variance and hardship provisions.[23]

Another aspect of the conflict between churches and landmark commissions has been attempts to create religious exemptions or owner consent provisions in local preservation ordinances for landmark desig-

17. 30 Conn. App. 765, 622 A.2d 591 (1993).

18. 269 N.J. Super. 562, 636 A.2d 96 (1994) (finding no First Amendment violation).

19. 271 N.J. Super. 241, 638 A.2d 839 (1994) (ruling that denial of variance to permit occasional religious worship of small numbers of persons in private home was unjustified).

20. In Society of Jesus v. Boston Landmarks Commission, 409 Mass. 38, 564 N.E.2d 571 (1990), and First Covenant Church v. City of Seattle, 114 Wash. 2d 392, 787 P.2d 1352 (1990), *vacated and remanded*, 111 S. Ct. 1097 (1991), *holding reinstated*, 120 Wash. 2d 203, 840 P.2d 174 (1992), the Massachusetts and Washington courts found that the designation of a church as a landmark violated the state and/or federal constitution, while in St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991), the Second Circuit held that the Free Exercise Clause did not require the New York City Landmarks Commission to permit a church to demolish a landmarked auxiliary building in order to erect an office tower in its place.

21. 129 Wash.2d 238, 916 P.2d 374 (1996).

22. Keeler v. Cumberland, 928 F. Supp. 591 (D. Md. 1996) (*Keeler I*).

23. Keeler v. Cumberland, 940 F. Supp. 879 (D. Md. 1996) (*Keeler II*).

nation of religious properties[24] or to enact state legislation imposing similar restrictions. Although the most recent attempt to enact such state legislation—an amendment to California's enabling legislation for local historic preservation ordinances which created an exemption for property owned by religious institutions—was successful, the statute was struck down as violative of the Establishment Clauses of the U.S. and California Constitutions by a trial court in *East Bay Asian Local Dev. Corp. v. State of California*.[25]

II. Regulation of Signs and Billboards

A. *Regulation of Real Estate Signs*

In *Linmark Assocs., Inc. v. Township of Willingboro*,[26] the U.S. Supreme Court held that a local government may not prohibit the use of temporary real estate signs in residential areas because such a prohibition unduly restricts the flow of information. Although courts have upheld the imposition of reasonable restrictions on the size, number, and location of real estate signs in furtherance of legitimate interests such as aesthetics,[27] such restrictions are always suspect because they are content-based. In the most recent case involving this issue, *Cleveland Area Bd. of Realtors v. City of Euclid*,[28] an organization of real estate brokers challenged a city ordinance restricting real estate signs to placement in windows, as opposed to the more normal placement of such signs in the yard of a property offered for sale. Although the federal district had found that the ostensibly content-neutral regulation was, in reality, aimed at the message of "white flight" conveyed by realty signs,[29] the Sixth Circuit viewed the ordinance as a content-neutral regulation, despite the alleged motives of the members of the city council, but still struck it down based on the findings that the ordinance was neither narrowly tailored to achieve its claimed interest in aesthetics nor did it provide an adequate alternative channel of communication.

24. Some local ordinances provide more limited protection for churches, such as exemption from interior designation or hardship provision for tax-exempt properties.
25. No. 95AS02560 (Cal. Super. Ct. May 15,1996).
26. 431 U.S. 85 (1977).
27. *See, e.g.*, South-Suburban Housing Center v. Greater South Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir.), *cert. denied sub nom.*, Greater South Suburban Bd. of Realtors v. Blue Island, 112 S. Ct. 971 (1992) (upholding restrictions on the size, placement, and number of realty signs to protect the aesthetic interests of a wooded semi-rural village).
28. 88 F.3d 382 (6th Cir. 1996).
29. CABOR v. City of Euclid, 833 F. Supp. 1253 (N.D. Ohio 1993).

B. *Regulation of Alcohol and Cigarette Advertising*

In 1995, the Fourth Circuit, relying on the *Central Hudson* test for commercial speech,[30] affirmed the district courts' rulings in two cases that upheld Baltimore ordinances enacted to restrict outdoor advertising of cigarettes and alcoholic beverages. In *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore*,[31] the brewer and an outdoor advertising company challenged the ordinance banning billboard advertising of alcoholic beverages,[32] while *Penn Advertising v. Mayor and City Council of Baltimore*,[33] involved the advertising company's challenge to the ordinance prohibiting cigarette advertising on billboards located in certain designated zones. In both cases, the Fourth Circuit emphasized that the city had acted reasonably in restricting the locations where alcohol and tobacco could be advertised on billboards because the regulations materially advanced the city's interest in promoting the welfare of minors by seeking to reduce alcohol and tobacco consumption by minors.

Both of these cases were subsequently vacated by the U.S. Supreme Court, however, and remanded[34] for further consideration in light of the Court's ruling in *44 Liquormart, Inc. v. Rhode Island*,[35] in which the Court struck down a state statute that virtually banned price advertising for alcoholic beverages as a violation of the First Amendment.[36] While a decision on remand is still pending in *Penn Advertising*, the Fourth Circuit has again affirmed the district court in *Anheuser-Busch*, holding that the ordinance banning billboards advertising alcoholic bev-

30. Central Hudson Gas & Elec. Co. v. Public Service Comm'n, 447 U.S. 557 (1980) sets forth a four-part test for restrictions on commercial speech: (1) Is the speech lawful and not misleading? If so, it is protected by the First Amendment, and the court must ask: (2) whether the asserted government interest is substantial. If it is, the court must determine (3) whether the regulation directly advances the governmental interest asserted and (4) whether it is not more extensive than necessary to serve that interest.

31. 63 F.3d 1305 (4th Cir. 1995), *aff'g*, 855 F. Supp. 811 (D. Md. 1994).

32. In 1993, the Maryland legislature had enacted a statute that delegated authority to the City of Baltimore to adopt an ordinance restricting outdoor advertising of alcoholic beverages if the city determined the ordinance is "necessary for the promotion of the welfare and temperance of minors." *Id.* at 812–13.

33. 63 F.3d 1318 (4th Cir. 1995), *aff'g*, 862 F. Supp. 1402 (D. Md. 1994).

34. Penn Advertising of Baltimore, Inc. v. Schmoke, 116 S. Ct. 2575 (1996), *vacating and remanding*, 63 F.3d 1318, and Anheuser-Busch, Inc. v. Schmoke, 116 S. Ct. 1821 (1996), *vacating and remanding*, 63 F.3d 1305.

35. 116 S. Ct. 1495 (1996).

36. Although the Court was unanimous in striking down the statute, the Justices split on the rationale for their ruling. For a discussion of the differences between the principal opinion, written by Justice Stevens, and the concurring opinion of Justice O'Connor. *See* Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. LEGISLATION 1, 9-11 (1997).

erages in areas where they are likely to be viewed by minors is a valid time, place, and manner regulation.[37]

III. Adult Business Regulations[38]

A. *Zoning Restrictions on Location*

The U.S. Supreme Court has established that municipalities may single out adult businesses for special regulatory treatment in the form of locational restrictions if the municipality can show a substantial public interest in regulating such businesses unrelated to the suppression of speech and if the regulations allow for a reasonable number of alternative locations.[39] An ordinance will be struck down, however, when cities attempt to regulate because they object to the sexually explicit messages conveyed by adult businesses or seek to exclude, or severely restrict, adult businesses through an outright ban or excessive locational requirements.[40]

After struggling to develop a standard for judging the reasonableness of locational restrictions, courts have recently focused on whether there are an adequate number of potential sites for adult businesses within the relevant local real estate market.[41] As currently defined, this standard allows consideration of economic factors to define the relevant

37. 101 F.3d 325 (1997).

38. The terms "adult business" or "adult entertainment business" typically refers to bookstores, theaters, mini-theaters, video rental stores, bars, and cabarets that purvey "adult entertainment" consisting of performances or merchandise characterized by an emphasis on nudity and sexual acts. *See generally* J. GERARD, LOCAL REGULATION OF ADULT BUSINESSES (1992), and F. STROM, ZONING CONTROL OF SEX BUSINESSES (1977).

39. Young v. American Mini-Theatres, 427 U.S. 50 (1976), and City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

40. *See, e.g.* Woodall v. City of El Paso, 959 F.2d 1305, *modifying* 950 F.2d 255 (5th Cir.), *cert. denied,* 113 S. Ct. 304 (1992) (requiring all 39 adult businesses in city to relocate). *See also* Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) (requiring at least 30 of 36 adult businesses to relocate to 0.54 percent of the total land area of the city).

41. The "real estate market" standard appeared initially in the Fifth Circuit's 1992 decision in *Woodall,* 959 F.2d at 1305, where, after recognizing that *Renton* "contemplated that there was a 'market' in which [adult] businesses could purchase or lease real property on which business could be conducted," the court ruled that "land with physical characteristics that render it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered 'available' for constitutional purposes under Renton," but declined to address "the relationship between the economics of site location and the constitutionality of an adult business zoning ordinance." *Id.* at 1306. In a later ruling in this same case, the Fifth Circuit applied this standard to reverse and remand a district court decision on the ground that the jury had improperly taken commercial reasonableness into account when it determined that the adult business provisions of the zoning ordinance left insufficient locations for adult businesses.

real estate market but bars consideration of "commercial viability" for particular sites that are found to be within the relevant market. This approach, which allows courts to judge whether sites for adult businesses are "reasonably available," affords local government ample opportunity to impose significant locational restrictions on adult businesses to avoid undesirable secondary effects, but prevents local government from effectively banning such businesses by limiting them to locations that present insuperable physical, legal, or economic barriers to development or operation.

In *North Avenue Novelties, Inc. v. City of Chicago*,[42] for example, the court upheld an ordinance allowing adult uses on less than 1 percent of land, where the evidence showed twenty-two to fifty-six sites were available, the city received only four to five inquiries per year regarding new adult uses, and no person had been prevented by the ordinance from attempting to open an adult use.

In addition to overly severe locational restrictions, an adult entertain-

In Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), the Ninth Circuit squarely faced the economics question that *Woodall* had avoided. Recognizing that the distinction between economic and other factors is difficult to maintain because physical and legal unavailability can be presented as economic unavailability—e.g., a site located five miles from the nearest public road could be seen either as physically unavailable or, given the cost of constructing an access route, as economically unavailable—the Ninth Circuit argued that the economics of site location is a valid inquiry, so long as the economic analysis focuses on whether a site is part of the relevant real estate market. *Id.* at 1530. The court stated:

> Accordingly, we do not think that *Renton* forbids a court to consider economics when evaluating whether a particular site is in fact part of the real estate market. For purposes of *Renton*, the distinction is between consideration of economic impact within an actual business real estate market and consideration of cost to determine whether a specific relocation site is part of the relevant market. A court may not consider the former, but it may consider the latter when determining whether a specific site is reasonably suitable for the operation of a business.

After reviewing several decisions involving locational restrictions, the Ninth Circuit noted the conditions that need to apply for a particular site to be considered part of the relevant real estate market. *First*, although *Renton* stressed that properties only had to be "potentially" available, the court argued that "a property is not 'potentially' available when it is unreasonable to believe that it would ever become available to any commercial enterprise." *Second*, sites in manufacturing or industrial zones are part of the market if they are: reasonably accessible to the general public; have a proper infrastructure of sidewalks, roads and lighting; and are generally suitable for some form of commercial enterprise. *Third*, and most obviously, commercially zoned locations are part of the real estate market. Once a site qualifies as part of the real estate market under these criteria, however, its "commercial viability" as an adult business location is irrelevant. Applying these criteria to the relocation sites offered under the challenged Los Angeles ordinance, the court concluded that much of the land "potentially available" for the relocation of adult businesses was not part of the real estate market and struck down the ordinance because it did not provide sufficient "reasonably available" sites for the relocation of adult businesses.

42. 88 F.3d 441 (7th Cir. 1996).

ment ordinance can also be struck down when the local government cannot show that the ordinance was enacted for the purpose of addressing negative secondary effects. In *Secret Desires Lingerie, Inc. v. City of Atlanta*,[43] for example, the Georgia Supreme Court held that an "adult entertainment" ordinance regulating lingerie modeling studios enacted without any consideration of the potential negative secondary effects of such businesses was unconstitutional.[44] Similarly, in *T & D Video, Inc. v. City of Revere*,[45] the Massachusetts court struck down an ordinance, in part, because there was no evidence "negative secondary effects" were considered before enactment and the court held that justifications offered during litigation are insufficient to show that the ordinance was enacted to serve a substantial governmental interest.

B. *Licensing/Special Permit Ordinances*

In *FW/PBS, Inc. v. City of Dallas*,[46] the U.S. Supreme Court ruled that the licensing provisions of a comprehensive adult business ordinance constituted a prior restraint on freedom of expression because, rather than penalizing expression after the fact, it prevented the expression from occurring in the first place. While such prior restraints are not unconstitutional per se, there is a strong presumption that they are not constitutionally valid.[47]

Because special, or conditional, permits, raise the same prior restraint issues as licensing ordinances, courts have applied the *FW/PBS* standards in those instances as well. Recent decisions applying the *FW/PBS* ruling have struck down ordinances that lacked effective time

43. 470 S.E.2d 879 (Ga. 1996).

44. *See also* Chambers v. Peach County, 467 S.E.2d 819 (Ga. 1996) (holding that county ordinance violated First Amendment because it had not relied on evidence reasonably related to problem of undesirable secondary effects of adult nightclub featuring nude dancing).

45. 670 N.E.2d 162 (Mass. 1996).

46. 493 U.S. 215 (1990).

47. The six Justices in the majority split evenly, however, on what procedural safeguards were required to validate an adult business licensing ordinance. While all agreed that such ordinances must not "place unbridled discretion in the hands of a government official or agency"; must require a definite time limit within which the decision-maker must issue or deny the license, during which time the status quo must be maintained; and must allow for prompt judicial review if the license is erroneously denied, Justice Brennan, joined by Justices Marshall and Blackmun, argued that, in addition, a licensing ordinance must require that the government bear both the burden of going to court to enforce the denial of a license application and the burden of proof in court. Justice O'Connor wrote an opinion arguing for the lesser standard, which was joined by Justices Kennedy and Stevens. The procedural safeguards about which the Justices disagreed were first stated in Freedman v. Maryland, 380 U.S. 51 (1965).

limitations,[48] failed to limit the discretion of city officials,[49] required adult businesses operating at the time an ordinance was enacted to cease operations until they obtained a license or permit,[50] or charged higher fees for adult businesses, because this regulated on the basis of the content of expression.[51] Likewise, in *JJR, Inc. v. City of Seattle*,[52] the Washington Supreme Court, without citing *FW/PBS*, held that a licensing scheme that allowed the city to revoke or suspend a license to operate an adult business without a mandatory stay of revocation or suspension pending judicial review was an invalid prior restraint under the state constitution. But where a licensing or special permit scheme provides adequate procedural safeguards, it will be upheld.[53]

C. *Regulating Nude Dancing Through Public Indecency Laws*

In *Barnes v. Glen Theatres, Inc.*,[54] a divided Supreme Court upheld the application of Indiana's public indecency statute to prohibit totally nude dancing in bars and cabarets. Courts have routinely upheld ordinances prohibiting nude dancing in adult entertainment establishments, based on a showing that the ordinance was aimed at avoiding undesirable secondary effects.[55] Courts will also invoke the Twenty-First Amendment to uphold local ordinances that prohibit nude dancing in bars or deny a liquor license to any establishment that features totally nude dancing,[56] or require more clothing to be worn by erotic dancers in an

48. *See, e.g.*, Annapolis Road, Ltd. V. Anne Arundel County, 686 A.2d 727 (Md. Ct. App. 1996); 11126 Baltimore Boulevard, Inc. v. Prince George's County, 32 F.3d. 109 (4th Cir. 1994); Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994); MGA SUSU, Inc. v. County of Benton, 853 F. Supp. 1147 (D. Minn. 1994).

49. *See, e.g.*, 3570 East Foothill Blvd., Inc. v. City of Pasadena, 912 F. Supp. 1268 (C.D. Cal. 1996); East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220 (6th Cir. 1995).

50. *See* T.K.'s Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994); Grand Brittain, Inc. v. City of Amarillo, Texas, 27 F.3d 1068 (5th Cir. 1994).

51. *See* AAK, Inc. v. City of Woonsocket, 830 F. Supp. 99 (D.R.I. 1993).

52. 126 Wash. 2d 1, 891 P.2d 720 (1995).

53. *See, e.g.*, Specialty Malls of Tampa v. City of Tampa, 916 F. Supp. 1222 (M.D. Fla. 1996); City of Colorado Springs v. 2354 Inc., 1995 WL 262721 (Colo.).

54. 501 U.S. 560 (1991).

55. *See, e.g.*, Dodger's Bar & Grill v. Johnson County Bd. of Comm'rs, 815 F. Supp. 399 (D. Kan. 1993), *remanded on other grounds*, 32 F.3d 1436 (10th Cir. 1994); *decision on remand*, 889 F. Supp. 1431 (D. Kan. 1995), *aff'd*, 98 F.3d 1262 (10th Cir. 1996); Cafe 207, Inc. v. St. Johns County, 856 F. Supp. 641 (M.D. Fla. 1994); Bright Lights, Inc. v. City of Newport, 830 F. Supp. 378 (E.D. Ky. 1993); O'Malley v. City of Syracuse, 813 F. Supp. 133 (N.D.N.Y. 1993); Gravely v. Bacon, 263 Ga. 203, 429 S.E.2d 663 (1993); S.J.T., Inc. v. Richmond County, 263 Ga. 267, 430 S.E.2d 726 (1993).

56. *See* Proctor v. County of Penobscot, 651 A.2d 355 (Me. 1994); Knudtson v. City of Coates, 519 N.W.2d 166 (Minn. 1994).

establishment serving alcohol than by citizens on the streets or beaches.[57]

By contrast, courts have struck down ordinances that extended the nude dancing ban to "mainstream" establishments,[58] or, conversely, upheld exceptions to the ban that are limited to "mainstream" establishments,[59] because there is no evidence that nude dancing in such establishments produces undesirable secondary effects. Courts have also not hesitated to strike down ordinances targeting nude dancing when an intent to suppress protected expression, rather than the stated concerns about secondary effects, was the motivation for the ordinance,[60] or the ordinance was unconstitutionally vague or overbroad.[61]

Although the opinions by Justices Rehnquist and Scalia in *Barnes* gave a green light to state and local governments to bar nude dancing on public morality grounds, the fact that Justice Souter, who provided the crucial fifth vote to uphold the statute, based his concurring opinion on a secondary effects justification for the statute has strongly influenced subsequent court decisions.

Courts have, however, differed in their consideration of the "secondary effects" issue. In *Triplett Grille, Inc. v. City of Akron*,[62] for example, the Sixth Circuit struck down an ordinance banning *all* nudity in public places because the city had produced no evidence that the ordinance was required to address negative secondary effects of *non-adult-entertainment*, as was required by Justice Souter's concurrence in *Barnes*. But in *Pap's A.M. v. City of Erie*,[63] a Pennsylvania appellate court upheld a public nudity ordinance under a "secondary effects" rationale, distinguishing Triplett Grille because the state court found that it could adequately narrow the construction of the ordinance to avoid constitutional conflicts, whereas the Sixth Circuit was unable to supply a narrowing interpretation because federal courts will not rewrite statutes to create constitutionality.

An extremely critical view of the Souter approach can be seen in *Nakatomi Investments, Inc. v. City of Schenectady*,[64] where the court stated that "[a]pplying the lax standard articulated by Justice Souter

57. *See Dodger's Bar & Grill*, 815 F. Supp. at 399.
58. *See, e.g.*, Pel Aso, Inc. v. Joseph, 262 Ga. 904, 427 S.E.2d 264 (1993).
59. *See, e.g.*, Top Shelf, Inc. v. Mayor and Aldermen for City of Savannah, 840 F. Supp. 903 (S.D. Ga. 1993); *S.J.T., Inc.*, 430 S.E.2d at 726.
60. *See* Conner v. Town of Hilton Head Island, 442 S.E.2d 608 (S.C. 1994).
61. *Id. See also* Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994); *Pel Asso*, 427 S.E.2d at 264.
62. 40 F.3d 129 (6th Cir. 1994).
63. 674 A.2d 338 (Pa. Cmwlth. 1996).
64. 949 F. Supp.988 (N.D.N.Y. 1997).

to its logical conclusion, one naturally comes to the point where the government can ban all forms of erotic dancing, nude or otherwise, so long as there are pernicious side effects somehow associated with the performance."[65]

Thus, the analysis of the "secondary effects" issue can be critical to a court's view of an ordinance that "targets" nude/topless dancing outside of "mainstream" venues. Such "targeting" can either be seen as valid under a "secondary effects" analysis, or as impermissible censorship if the court rejects Justice Souter's analysis and relies on the public morality rationale stated by the *Barnes* plurality. *See Nakatomi, supra,* unless the court applies a narrowing construction as in *Pap's, supra.*

Regulation of dancers' contact with patrons has been an emerging issue, with courts upholding ordinances that impose "time, place and manner" restrictions on erotic dancing, such as barring physical contact with patrons or prescribing minimum distances between dancers and patrons.[66]

65. *Id.* at 8. *See, e.g.*, Bright Lights, Inc. v. City of Newport, 830 F. Supp. 378 (E.D. Ky. 1993), upholding ordinance requiring dancers to wear bathing suits.

66. *See, e.g.*, Colacurcio v. City of Kent, 944 F. Supp. 1470 (W.D. Wash. 1996), upholding 10-foot distance requirement, and rejecting claim that "table dancing" is unique form of expression protected by the U.S. Constitution; DLS, Inc. v. City of Chattanooga, 894 F. Supp. 1140 (E.D. Tenn. 1995), and Vanda Hodge Pub, Inc. v. New York St. Liq. Auth., 634 N.Y.S.2d 152 (A.D. 2d Dep't 1995) (both upholding 6-foot requirement); Club Southern Burlesque, Inc. v. City of Carrollton, 265 Ga. 528, 457 S.E.2d 816 (1995) (upholding 4-foot requirement).